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No. _____

In The Supreme Court Of The United States

STEPHEN J. HUFFMAN, Warden, *Petitioner*,

v.

RICHARD M. FRAZIER, *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Given the "presumption of adequate performance" afforded to trial counsel under *Strickland v. Washington*, 466 U.S. 668 (1984), may a federal court in a capital habeas case governed by the Antiterrorism and Effective Death Penalty Act (AEDPA) adopt the contrary presumption, and thus grant habeas relief based solely on the court's willingness to presume that counsel inadequately investigated certain potentially mitigating evidence, despite the lack of any evidence regarding the scope of that investigation?

2. May federal courts sitting in habeas impose detailed rules of conduct governing trial counsel's strategic choices in a capital case that go beyond *Strickland v. Washington's* reasonableness approach?

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PETITION FOR WRIT OF CERTIORARI

The Attorney General of Ohio, on behalf of the Warden of the Mansfield Correctional Institution in Mansfield, Ohio, respectfully petitions for a writ of certiorari to review the order of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The United States Sixth Circuit Court of Appeals Opinion is attached as Appendix A. The Sixth Circuit's Amended Opinion is attached as Appendix B. The Sixth Circuit's denial of rehearing en banc is attached as Appendix C. The United States District Court for the Northern District of Ohio's unreported Memorandum and Order are attached as Appendix D. The Ohio Supreme Court's denial of discretionary review is attached as Appendix E. The Ohio Eighth District Court of Appeals' unreported Opinion and Order in State post-conviction proceedings is attached as Appendix F.

JURISDICTION

The United States Court of Appeals issued its opinion on September 8, 2003. On February 17, 2004, this Court granted the Warden an extension of time to file his petition from February 26, 2004 to March 26, 2004. The Warden timely filed his petition and invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

Section 2254(d) of Title 28 of the United States Code provides:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to a judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

INTRODUCTION

This petition presents important questions regarding the presumption of adequacy to be afforded trial counsel's performance in a capital case. Although this Court has clearly articulated that there is a "presumption of adequate performance," *see Strickland v. Washington*, 466 U.S. 668, 699 (1984), the Sixth Circuit decision below eschewed this time-tested presumption and adopted a series of contrary ones. In so doing, the Sixth Circuit created a direct conflict, not only with this Court's precedent, but with the case law of at least three other Circuits as well. Even more troubling, the Sixth Circuit's decision here threatens to create rigid rules handcuffing trial counsel's strategic choices in capital cases to the detriment of their clients.

With its decision below, the Sixth Circuit has created two new and entirely unwarranted presumptions regarding trial counsel's performance. First, courts undertaking habeas review in the Sixth Circuit will now presume, absent evidence from the State to the contrary, that trial counsel failed to investigate potential mitigating evidence. Second, these courts will also make a virtually *irrebuttable* presumption that no reasonable attorney would choose a residual doubt defense if there is even a shred of evidence that the defendant could possibly have suffered some form of brain damage from a head injury. Instead, trial counsel must pursue the "brain damage defense" in the penalty phase, regardless of whether that strategy conflicts with the guilt phase defense or whether it will lead to the revelation of evidence concerning a defendant's criminal history.

In reaching these conclusions, the Sixth Circuit not only reversed this Court's traditional presumption of adequate representation, but it also substituted its own assessment of trial counsel's performance for that of the state court in derogation of its duty under AEDPA to respect state

court adjudications. While the Warden urges this Court to grant certiorari to resolve the issues and legal conflicts here, the Warden respectfully suggests in the alternative that the Sixth Circuit's clear error in applying *Strickland* may warrant summary reversal.

Moreover, in addition to running afoul of *Strickland*, the Sixth Circuit decision here also creates a direct conflict among the Circuits regarding the permissibility of a "residual doubt" defense. In particular, as noted above, the Sixth Circuit will now adopt a virtually irrebuttable presumption of ineffective assistance should trial counsel rely on residual doubt rather than presenting brain injury evidence. In the words of the court below, choosing residual doubt over brain injury evidence is "on its face irrational." *Frazier v. Huffman*, 343 F.3d 780, 796 (6th Cir. 2003), Appendix A at 24a. But, this presumption directly conflicts with decisions in both the Tenth and Eleventh Circuits. Each has held that reasonable counsel could elect to rely on a residual doubt strategy rather than present brain damage evidence. *See, e.g., Bryan v. Mullin*, 335 F.3d 1207 (10th Cir. 2003) (en banc); *Parker v. Sec'y Dep't of Corrections*, 331 F.3d 764 (11th Cir. 2003). And, to the extent that the decision below requires trial counsel to rely on brain injury evidence above *all* else (*i.e.*, not merely instead of residual doubt)—even if it prompts negative rebuttal evidence—the Sixth Circuit's decision directly conflicts with Ninth Circuit case law as well. *See Williams v. Woodford*, 306 F.3d 665 (9th Cir. 2002).

Perhaps most disconcerting, the decision below directly undermines defense counsel's ability to effectively try capital cases. The decision mandates certain strategic choices governing trial counsel's conduct in a capital trial—notwithstanding that this Court has repeatedly indicated that trial counsel must remain free to fashion their own strategy in light of the unique circumstances each case presents. In light

of the Sixth Circuit's failure to follow this Court's precedent, as well as the Circuit split the decision below creates, the Warden respectfully requests this Court to grant his petition and reverse the Sixth Circuit's decision below.

STATEMENT OF THE CASE

A. Frazier Brutally Murdered His Stepdaughter.

Richard Frazier married Susan Bednarski in 1980, thereby becoming stepfather to Susan's eight year-old daughter Tiffany Skiba. In February 1986, Bednarski discovered that Tiffany was pregnant, and both women believed that Frazier was the father. Bednarski soon sought a divorce. And in October 1988, Medina County (Ohio) authorities indicted Frazier on two counts of rape.

Upon losing a lengthy legal battle over whether he had to submit to paternity testing in connection with his rape trial, Frazier rented a car and drove to Tiffany's grandparents' house in the early morning hours of November 5, 1990. After Tiffany's grandfather left at 5:00 AM to drive his wife to work, Frazier broke into the home through a basement window. He entered Tiffany's room and stabbed her nineteen times. Frazier slipped out of the house before Tiffany's grandfather returned fifteen minutes later.

Several facts connected Frazier to the crime: (1) Frazier's footprints in the yard; (2) Frazier's motive to commit the crime; (3) Frazier's treatment for a stab wound the morning of the murder, which was consistent with the victim's use of a knife to protect herself; (4) Tiffany's fear that Frazier would kill her; (5) Frazier's intimate knowledge of the layout of the Skiba's household; and (6) Frazier's statement to police that he wished to plead guilty to the rape and murder of Tiffany in return for a definite term sentence.

B. A State Court Jury Convicted Frazier, And He Received A Capital Sentence.

The Cuyahoga County (Ohio) Prosecutor's Office indicted Frazier on two counts of aggravated murder: felony murder and murder committed with prior calculation and design. Each count contained three capital specifications: (1) that the murder was committed during or immediately after an aggravated burglary; (2) that the victim was a witness and was purposely killed to prevent her testimony; and (3) that the murder was committed for the purpose of escaping trial and/or punishment for another offense committed by him (*i.e.*, rape). The State also charged a separate count of aggravated burglary.

At trial, Frazier defended on the theory that he did not commit the crime, arguing that there was no definitive evidence linking him to it. After an eight-day trial and three days of deliberations, however, the jury returned guilty verdicts on all three counts and also found that the three specifications under Counts One and Two were each proved beyond a reasonable doubt. After a mitigation hearing where Frazier made an unsworn statement denying his guilt and his attorneys argued for a life sentence based on residual doubt, the jury recommended death. The court followed this recommendation and imposed a capital sentence.

C. Frazier Litigated His Ineffective-Assistance-Of-Counsel Claim On The Merits In State Court.

Since his conviction, Frazier has exhaustively litigated alleged "errors" associated with his trial, his sentence, and his appeals. This includes the specific "error" on which the Sixth Circuit relied in granting habeas relief below—namely, ineffective assistance of trial counsel in the penalty phase. Although the post-conviction trial court that

first considered his claim found it barred on procedural grounds (*res judicata*), the post-conviction appellate court considered—and rejected—it on the merits. *See State v. Frazier*, unpublished opinion, Ohio Eighth District Court of Appeals, No. 71746 (Dec. 11, 1997), Appendix F.

Frazier first raised this claim as his first and second grounds for relief in his State post-conviction petition. He attached to his petition an affidavit from Dr. Sharon Pearson, a psychologist, in which she summarily asserted that trial counsel needed, but had failed to obtain, a psychologist to interpret the extensive documents that the trial mitigation specialist had gathered, which included records of "Frazier's childhood, family, school, employment, medical history and incarcerations." *See id.* at 171a-172a. Frazier also sought funds from the court for additional psychological testing. The trial court denied this request, and dismissed his petition, finding each of his asserted causes of action barred by *res judicata*. *See id.* at 172a.

After the trial court's denial, Frazier filed a motion for relief from judgment in which he argued that he had new evidence in the form of Pearson's supplemental affidavit. Dr. Pearson claimed that she had given Frazier unspecified tests and concluded that further testing by a neuro-psychologist would be beneficial in determining the existence of suspected brain damage. *See id.* at 173a. The trial court denied this motion as well.

On appeal, the Eighth District Court of Appeals affirmed the lower court's judgment. *Id.* at 181a. Rather than relying on *res judicata*, though, the appellate court reached the merits of Frazier's claims. With regard to Frazier's claim that trial counsel was defective in failing to pursue the brain damage theory, the court specifically found that counsel had been aware of the possibility of such a claim, but had strategically opted against pursuing that

defense. *Id.* at 179a. And it further found that this represented a reasonable choice. *Id.*

D. Frazier Pursued Habeas Relief, Asserting Thirty Grounds Of Relief Including The Ineffective Assistance Claim He Had Previously Litigated In State Court.

In December 1998, Frazier filed a federal habeas petition asserting thirty grounds for relief. *Frazier v. Mitchell*, Case No. 3:98 CV 2098 (Jan. 5, 2001), Appendix D at 63a. Frazier raised his ineffective-assistance-of-trial-counsel claims regarding the head injury evidence as his nineteenth and twentieth grounds for relief. *Id.* at 136a-145a.

On April 17, 2000, Frazier attempted to supplement the record with the report of his habeas psychological expert, Dr. Mack. The district court allowed expansion of the record over the Warden's objection. The Warden then deposed Dr. Mack, and the district court granted expansion of the record to include Dr. Mack's deposition transcript.

On January 5, 2001, the district court denied Frazier's petition. *See Frazier v. Mitchell*, Case No. 3:98 CV 2098 (Jan. 5, 2001), Appendix D. On the ineffective assistance claim, the district judge honored two state court findings: (1) counsel were aware of the underlying head injury; and (2) counsel's decision not to pursue that defense was strategic. *Id.* at 138a-140a (citing *Sumner v. Mata*, 449 U.S. 539, 545-46 (1981)). The judge also found that even if he could consider Frazier's federally-developed brain damage evidence (in the form of Dr. Mack's proposed testimony), it would make no difference because it was "essentially speculative[] and insufficiently favorable," particularly in light of the strong evidence that Frazier planned the killing as opposed to acting on impulse in a stressful situation. *Id.* at 140a.

In a split decision, the Sixth Circuit reversed the District Court's judgment. After reciting the *Strickland* standards for resolving the claim and noting that the Ohio courts rejected it on the first prong, the majority set out to examine the ineffective assistance claim *de novo*. The majority first found that since trial counsel were aware that Frazier had suffered a head injury in 1987, their alleged failure to investigate the injury further or present evidence of the injury was unreasonable. *Frazier v. Huffman*, 343 F.3d 780, 794 (6th Cir. 2003), Appendix A at 21a. The majority then found trial counsel's residual doubt strategy unreasonable because, according to the court, it was not a valid mitigator under Ohio law. *Id.* at 795, Appendix A at 22a.

After "conclud[ing] that trial counsel performed below an objective standard of reasonableness," *Id.*, Appendix A at 23a, the majority examined the state court's finding of a strategic reason for the defense strategy and rejected it out of hand: "We have concluded the opposite." *Id.* at 796, Appendix A at 23a. The majority then specifically disagreed with the state court's reasons for its finding. *Id.* at 800, Appendix A at 26a. And the majority finished its deficient performance analysis by finding the state court decision unreasonable because neither the state courts nor the State provided "any reason to explain or justify such a trial strategy." *Id.*, Appendix A at 26a.

For its prejudice analysis, the majority found that because the state court record contained "sufficient facts . . . to indicate the existence of evidence concerning Frazier's brain injury that could have been developed and presented to the jury," there was a reasonable probability of a different outcome. *Id.* at 797, Appendix A at 27a. The majority speculated that, in light of the injury evidence, counsel could have argued that Frazier did not plan to kill Tiffany when he snuck into the house—he only meant to confront her about

her rape charge and he killed on an impulse. *Id.* at 798-99, Appendix A at 28a.

Judge Batchelder dissented on the grounds that the claim was procedurally defaulted. *Frazier v. Huffman*, 343 F.3d 780, 802-07 (6th Cir. 2003) (Batchelder, J., dissenting), Appendix A at 36a-46a.

The Warden now seeks certiorari to address the conflicts the decision below creates both with this Court's precedent, and the law in the other Circuits, regarding the presumption of adequacy of counsel.

REASONS FOR GRANTING THE WRIT

I. The Sixth Circuit Decision Below Directly Conflicts With *Strickland*'s Presumption Of Adequacy In Ineffective-Assistance-Of-Counsel Cases And Thus Fundamentally Alters Habeas Litigation.

A. This Court Requires A Habeas Petitioner To Prove That Trial Counsel's Investigation Was Inadequate.

This Court in *Strickland v. Washington* found that the actions of trial counsel, both in developing trial strategy and in conducting investigation into the facts of a case, are afforded a strong presumption of adequacy. *See Strickland*, 466 U.S. 668, 690 (1984) ("[T]he court should recognize that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable and professional judgment."). In particular, the Court in *Strickland* stressed that, in assessing counsel's effectiveness in investigating a case, counsel's judgments are "afforded a heavy measure of deference." *Id.* at 691. As such, this Court has consistently required a habeas petitioner

to *prove* that trial counsel's penalty phase investigation was inadequate in order to escape the "virtually unchallengeable" nature of counsel's selected strategy. *See id.* at 690-91 (describing counsel's strategic choices made after thorough investigation as "virtually unchallengeable").

The typical way for a habeas petitioner to meet his burden of proof is through the testimony of trial counsel concerning their investigation. *See, e.g., id.* at 678 (the habeas petitioner called his counsel to testify at the federal evidentiary hearing "to inquire into trial counsel's efforts to investigate and to present mitigating circumstances"); *Darden v. Wainwright*, 477 U.S. 168, 184-87 (1986) (trial counsel testified at an evidentiary hearing); *Burger v. Kemp*, 483 U.S. 776, 788-96 (1987) (same); *Williams v. Taylor*, 529 U.S. 362, 373, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000) (trial counsel testified at a state evidentiary hearing regarding their investigation and confirmed that they did not investigate the mitigating evidence subsequently identified by Williams in his post-conviction litigation); *Bell v. Cone*, 535 U.S. 685, 692, 697-701 (2002) (counsel testified about their decision not to recall the petitioner and his sister in light of the fear that they would reveal petitioner's criminal history); and *Wiggins v. Smith*, ___ U.S. ___, 123 S.Ct. 2527, 2536, 2539-40, 156 L.Ed.2d 471 (2003) (the state courts found, based on trial counsel's testimony, that their mitigation investigation consisted solely of an interview with a psychologist and review of PSI and DSS records, which this Court held was an unreasonable limit on the investigation).[1]

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[1] Indeed, before *Wiggins*, the Sixth Circuit used to require such a record as well. *Compare Mason v. Mitchell*, 320 F.3d 604, 620 (6th Cir. 2003) (remanding for an evidentiary hearing because "in order for us to evaluate whether defense counsel rendered constitutionally ineffective assistance at sentencing, we must know more about the extent of counsel's investigation and preparation of mitigating evidence"), *with Frazier* and *Hamblin v. Mitchell*, 354 F.3d 482, 490, 492 (6th Cir. 2003).

In fact, only last year, this Court reinforced the importance of using counsel's testimony in resolving ineffective assistance of counsel claims in *Massaro v. United States*, 538 U.S. 500, 123 S.Ct. 1690 (2003). In allowing federal criminal defendants to raise ineffective assistance claims in § 2255 proceedings, this Court stressed that such proceedings were the only forum that would allow development of the facts necessary to evaluate counsel's performance:

> The evidence introduced at trial. . . will be devoted to issues of guilt or innocence, and the resulting record in many cases will not disclose the facts necessary to decide either prong of the *Strickland* analysis. If the alleged error is one of commission, the record may reflect the action taken by counsel but not the reasons for it. The appellate court may have no way of knowing whether a seemingly unusual or misguided action by counsel had a sound strategic motive or was taken because the counsel's alternatives were even worse. . . . The trial record may contain no evidence of alleged errors of omission, much less the reasons underlying them.

Massaro, 538 U.S. at __, 123 S.Ct. at 1694. In fact, this Court suggested that it expects that counsel's testimony will be part and parcel of the record to be developed: "The court may take testimony from witnesses for the defendant and the prosecution and from the counsel alleged to have rendered the deficient performance." *Id.*

Where, as here, counsel's testimony is not part of the record, the presumption of adequacy is, if anything, even stronger. For example, in *Yarborough v. Gentry*, __ U.S. __,

124 S.Ct. 1, 5-6 (2003), this Court found that a defendant, relying on a post-trial record that did not include counsel's testimony, had to overcome an even more forceful presumption that trial counsel's strategy was reasonable. This Court there noted that this presumption "has particular force where a petitioner bases his ineffective-assistance claim solely on the trial record, creating a situation in which a court 'may have no way of knowing whether a seemingly unusual or misguided action by counsel had a sound strategic motive.'" *Id.* at 6 (quoting *Massaro, supra*). In light of the more forceful presumption of adequacy in *Yarborough*, the Court went on to summarily overrule the Ninth Circuit's conclusion that counsel's seemingly negative closing argument constituted deficient performance.

B. Instead Of Affording Counsel A Presumption Of Adequacy, The Sixth Circuit Presumed The Opposite.

Frazier has never sought any testimony whatsoever from any of his three trial attorneys concerning the scope and extent of their mitigation investigation. Thus, as *Yarborough supra* indicates, the presumption that trial counsel's investigation was adequate should have been strengthened. The Sixth Circuit, however, reversed this presumption of adequacy, and instead presumed that trial counsel had behaved unreasonably in allegedly failing to investigate Frazier's brain injury, thereby requiring the State to prove the contrary. Indeed, in at least four different passages from its decision, the Sixth Circuit alluded to the need for the State to prove adequacy of trial counsel, and not the other way around:

- We do not believe that it is reasonable to infer that a trial strategy, which is on its face irrational and *for which no justification has ever been produced*. .

> . . *Frazier*, 343 F.3d at 796, Appendix A at 24a (emphasis added);
>
> - *no reason at all has been adduced to justify the failure* of Frazier's trial counsel to investigate and present evidence of his brain impairment, and to instead rely exclusively on an argument of residual doubt. *Id.* at 797, Appendix A at 26a (emphasis added);
>
> - *Absent any reason to explain or justify such a trial strategy*, we conclude that the state court's determination that Frazier's trial counsel had performed in a competent manner during the penalty phase was not simply erroneous, but unreasonable. *Id.*, Appendix A at 26a (emphasis added).
>
> - The State has not challenged the contention that Frazier's trial counsel could have developed this information. . . . *Id.* at 794, Appendix A at 21a.

The court clearly expected the State to provide the explanation or justification for trial counsel's strategy. And since the court could not find such an explanation, it presumed that there was none.

Based on its own review of the record, the court then suggested three ways in which it felt trial counsel could have better investigated the brain injury: (1) by comparing the records with medical literature on brain damage; (2) by interviewing Frazier about the head injury and its effects on

him; and (3) by presenting the records to someone competent to evaluate them. *Id.* at 795, Appendix A at 21a-22a.

Underscoring the problem with the Sixth Circuit's approach (*i.e.*, reversing this Court's presumption of adequacy), here trial counsel may very well have undertaken one or more of the steps the Sixth Circuit described. There is simply no evidence in the record one way or the other. Given the lack of evidence, no one, including the Sixth Circuit, knows for certain what counsel did, especially with regard to the first two steps the court suggested. Admittedly, the record seems to confirm that counsel were unable to try the third option the court suggested as the trial judge denied their request for funds to hire their own psychologist. But even there, the possibility exists that counsel obtained a "free" review from experts retained by the State Public Defender's Office.[2] Without counsel's testimony on the matter, there is simply no way to tell from this record.[3] The

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[2] The local court psychiatric clinic recommended that counsel seek such aid from the Ohio Public Defender's Office rather than the clinic because the Public Defender's Office was more suited to providing the type of mitigation assistance required.

[3] In fact, the record tends to indicate that trial counsel indeed-investigated the brain injury and decided against using that evidence because of the risk involved in obtaining a negative psychiatric evaluation. That is, trial counsel attempted to obtain their own expert psychologist to assist counsel in their investigation and analysis of data. The trial judge denied this request and noted that trial counsel still had the option of seeking an independent evaluation from the court clinic. But the judge warned that such an evaluation was risky because the results of the evaluation—the good and the bad—would go to the prosecutor and the jury. Frazier's trial counsel declined this option for that very reason.

After the jury recommended the death sentence, defense counsel informed the court at the sentencing that they had developed information concerning Frazier's brain injury but that various legal considerations prevented them from presenting such evidence at the mitigation hearing.

only question is, in the absence of evidence, which way does the presumption of adequacy run? And, on that question, this Court's jurisprudence is clear. For the Sixth Circuit to reverse the traditional presumption and impute counsel's failure to investigate based on an incomplete record dramatically undercuts *Strickland* and its progeny. This clear failure to comply with *Strickland's* mandate, in and of itself, justifies a grant of certiorari, and may, the Warden respectfully suggests, even warrant summary reversal.

C. The Sixth Circuit's Decision Will Fundamentally Alter And Increase Habeas Litigation.

The Sixth Circuit's decision is problematic not only because it runs contrary to this Court's clear precedent on ineffective-assistance-of-counsel claims, but also because of the widespread impact that the decision will have, if left uncorrected, on habeas litigation. For instance, in light of the Sixth Circuit's decision, AEDPA's 28 U.S.C. § 2254(e) will be largely rendered null. Under § 2254(e), there is a presumption against granting a petitioner an evidentiary hearing on claims such as ineffective-assistance-of-counsel. *See* 28 U.S.C. § 2254(e).[4] Section 2254(e) makes clear that a

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See State v. Frazier, unpublished opinion, Ohio Eighth District Court of Appeals, No. 71746, p. 15 (Dec. 11, 1997), Appendix F at 179a.

[4] § 2254(e) provides:

(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

(2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that—

(A) the claim relies on—

habeas petitioner's ineffective-assistance-of-counsel claim will be decided based on the record, and that an evidentiary hearing will be granted only in certain extraordinary circumstances. From the face of the statute, the twin goals behind this provision seem clear: (1) To force petitioners to raise ineffective-assistance-of-counsel claims and develop that record in the state courts—closer in time to counsel's alleged error; and (2) To remove from the federal district courts the burden of conducting evidentiary hearings on such claims.

But now because the Warden has the burden of proof on ineffective-assistance-of-counsel claims, any time a petitioner can raise a possible mitigating factor not presented by counsel, the Warden will be forced to request an evidentiary hearing in order to properly rebut the petitioner's claim. Thus, what the Sixth Circuit's decision does is to absolve habeas petitioners of their burden under § 2254(e), while simultaneously undermining the goals underlying that provision. Hearings will become a matter of course, and thus more resources will be consumed in discovery and evidentiary hearings in the district courts. Additionally, petitioners no longer have any incentive to develop the factual predicate to their claims in the state courts. In fact, habeas petitioners may actually have an incentive to *avoid* developing a record of their claims in state courts, and thus let any record of counsel's alleged misdeeds grow stale. A

(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

stale record now benefits the petitioner and burdens the Warden. In other words, the Sixth Circuit has ensured that the Warden, and not the petitioner, will have to work—sometimes nearly twenty years after the fact—to recreate a record of counsel's action. *Cf. Martin v. Mitchell*, 280 F.3d 594, 615 (6th Cir. 2002) (no evidentiary hearing on ineffective assistance of trial counsel is necessary where counsel was unable to explain "why nearly 20 years had passed without an attempt to depose, interview, or otherwise contact Martin's trial counsel"). And if that record is too cold to recreate, the Sixth Circuit now says that a draw goes to the petitioner.

By undercutting the language and purpose of 28 U.S.C. § 2254(e), the "reverse presumption" adopted below threatens to swamp federal courts with a deluge of ineffective-assistance-of-counsel claims. This potentially endless stream of "second trials" over counsel's effectiveness was the very threat that led this Court to adopt the presumption of adequacy in the first place. *See Strickland*, 466 U.S. at 690.[5] In short, the decision below directly

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[5] This Court in *Strickland* noted the concerns with adopting a non-deferential standard in assessing counsel's performance:

> The availability of intrusive post-trial inquiry into attorney performance or of detailed guidelines for its evaluation would encourage the proliferation of ineffectiveness challenges. Criminal trials resolved unfavorably to the defendant would increasingly come to be followed by a second trial, this one of counsel's unsuccessful defense. Counsel's performance and even willingness to serve could be adversely affected. Intensive scrutiny of counsel and rigid requirements for acceptable assistance could dampen the ardor and impair the independence of defense counsel, discourage the acceptance of assigned cases, and undermine the trust between attorney and client.

conflicts with *Strickland*, and threatens the entire habeas framework for ineffective-assistance-of-counsel claims. The Warden respectfully requests this Court to grant certiorari in order to address and resolve these problems.

II. The Sixth Circuit's New Rule That It Is Per Se Ineffective For Counsel To Rely On A Residual Doubt Strategy Over Brain Injury Evidence Conflicts With Decisions In The Ninth, Tenth and Eleventh Circuits.

A. Residual Doubt Is A Valid Mitigation Strategy.

Despite the Sixth Circuit's claim to the contrary, "'[R]esidual doubt has been recognized as an extremely effective argument for defendants in capital cases.'" *Lockhart v. McCree*, 476 U.S. 162, 181, 90 L.Ed.2d 137, 106 S.Ct. 1758 (1986) (citation omitted). Legal scholarship buttresses this conclusion:

> "Residual doubt" over the defendant's guilt is the most powerful "mitigating fact." . . . The best thing a capital defendant can do to improve his chances of receiving a life sentence has nothing to do with mitigating evidence strictly speaking. The best thing he can do, all else being equal, is to raise doubt about his guilt.

Stephen P. Garvey, *Aggravation and Mitigation in Capital Cases: What Do Jurors Think?*, 98 Colum. L. Rev. 1538, 1563 (1998) (footnote omitted) (comprehensive study on the opinions of jurors in capital cases). *See also* William S. Geimer & Jonathan Amsterdam, *Why Jurors Vote Life or Death: Operative Factors in Ten Florida Death Penalty*

Strickland, 466 U.S. at 690.

Cases, 15 Am. J. Crim. L. 1, 28 (1988) ("The existence of some degree of doubt about the guilt of the accused was the most often recurring explanatory factor in the life recommendation cases studied.").

B. Ohio Law Permitted Trial Defense Counsel To Pursue A Residual Doubt Strategy At The Time Of Frazier's Trial.

The Sixth Circuit dismissed the residual doubt strategy by retroactively applying a 1997 Ohio Supreme Court decision to Frazier's 1991 trial: "Furthermore, as both this court and the Ohio Supreme Court have noted, residual doubt is not a mitigating factor under Ohio law." *Frazier*, 343 F.3d at 795, Appendix A at 22a (citing among other authorities *State v. McGuire*, 80 Ohio St.3d 390 (Ohio 1997)).[6] Since counsel offered only Frazier's unsworn statement of innocence and their residual doubt closing arguments, the Sixth Circuit found as a "fact that Frazier's counsel failed to offer any evidence during the penalty phase that is recognized under Ohio law as mitigation." *Id.*, Appendix A at 23a.

But reviewing courts are bound to judge the deficient performance prong "as of the time of counsel's conduct." *Strickland*, 466 U.S. at 690. The Ohio Supreme Court has recognized that as a matter of Ohio law it was perfectly

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[6] Although *McGuire* eliminates residual doubt as a mitigating factor under Ohio law, residual doubt still remains a valid and strong factor in those cases governed by the pre-*McGuire* standard. Indeed, a great number of pre-*McGuire* capital cases are still en route to the Sixth Circuit Court of Appeals. Moreover, the Sixth Circuit's decision here will continue to affect other states within the Sixth Circuit that recognize residual doubt as an appropriate mitigating factor. *See State v. Hartman*, 42 S.W.3d 44, 55-56 (Tenn. 2001) (recognizing continuing validity of residual doubt defense in Tennessee law).

legitimate to pursue a residual doubt strategy prior to the court's 1997 decision in *State v. McGuire*, *supra*. *State v. Smith*, 89 Ohio St.3d 323, 334, 731 N.E.2d 645, 656 (Ohio 2000) (finding that trial counsel were not ineffective in pursuing residual doubt strategy at penalty phase because the trial occurred in 1994, well before the *McGuire* decision), *cert. denied*, 531 U.S. 1167 (2001). Frazier's trial occurred some six years before the *McGuire* decision.

Trial counsel knew, and directly re-emphasized to the jury, that the guilt decision had been difficult for Frazier's jury to reach. Guilt phase deliberations spanned three days. So Frazier's trial counsel asked the trial judge to instruct the jury to consider residual doubt as mitigation. And the trial judge expressly gave such an instruction: "Under this category, defendant asserts that residual doubt of his guilt exists. *Residual doubt of a defendant's guilt may be considered in mitigation.*" (emphasis added).

The trial record and Ohio Supreme Court law flatly contradict the Sixth Circuit's finding of "fact" that Frazier's counsel presented no mitigation at trial.

C. Given The Legitimacy Of Residual Doubt As A Penalty Phase Strategy, The Sixth Circuit's Holding That No Reasonable Attorney Would Opt For It Over Potential Brain Injury Evidence Conflicts With The Tenth And Eleventh Circuits.

Despite the legitimacy of a residual doubt strategy under Ohio law in Frazier's case, the Sixth Circuit adopted a virtually irrebuttable presumption that is was ineffective assistance for counsel to rely on that strategy in the face of potential brain damage evidence. *See Frazier*, 343 F.3d at 794, Appendix A at 21a (stating that the court could "conceive of no rational trial strategy" justifying counsel's

choice). This per se rule directly conflicts with decisions in both the Tenth and Eleventh Circuits. According to both of these Circuits, but directly contrary to the decision below, pursuing residual doubt over brain injury evidence is *not* "on its face irrational." *See id.* at 796, Appendix A at 24a.

In *Parker v. Sec'y Dep't of Corrections*, 331 F.3d 764, 782, 788 (11th Cir. 2003), the Eleventh Circuit considered, *and rejected*, the approach the Sixth Circuit adopted here. There, like here, the habeas petitioner alleged that his trial counsel had been ineffective because they "did not adequately prepare for the sentencing phase of the trial, and relied solely on a reasonable doubt argument at sentencing which the jury had already rejected during the guilt phase." *Id.* at 787. In particular, the petitioner in *Parker* asserted that his counsel "should have presented mitigating evidence of his disadvantaged upbringing, alcohol and substance abuse, *psychological disorders, and brain damage*." *Id.* (emphasis added). Unlike the Sixth Circuit, however, which found that pursuing residual doubt over these other forms of mitigating evidence would be "on its face irrational," the Eleventh Circuit easily concluded that trial counsel in *Parker* "were not deficient". *Id.* In fact, the Eleventh Circuit, in language directly conflicting with the opinion below here, found that "[c]reating lingering or residual doubt over a defendant's guilt is not only a reasonable strategy, but 'is perhaps the most effective strategy to employ at sentencing.'" *Id.* at 787-88 (*quoting Chandler v. United States*, 218 F.3d 1305, 1320 (11th Cir. 2000)). Simply put, *Parker* reflects a vastly different approach from the irrebuttable presumption of ineffectiveness adopted by the Sixth Circuit here.

The Tenth Circuit's en banc decision in *Bryan v. Mullin*, 335 F.3d 1207 (10th Cir. 2003) (en banc) similarly conflicts with the opinion here. In *Bryan*, the petitioner challenged his counsel's failure to introduce evidence of

"organic brain syndrome" during the penalty phase. The Tenth Circuit, however, found that "the use of mental health evidence during the penalty phase would not have been effective following a guilt phase defense of actual innocence." *Id.* at 1220. Expert defense counsel testified that the introduction at the penalty phase of a theory that is inconsistent with a guilt phase strategy of innocence is the "kiss of death." *Id.* at 1223 n.22. *See also Haliburton v. Sec'y Dep't of Corrections*, ___ F.3d ___, 2003 U.S. App. LEXIS 17166, *33 (11th Cir., Aug. 21, 2003) (penalty phase evidence of "brain damage . . . can often hurt the defense as much or more than it can help").

The extent of the conflict created by the Sixth Circuit here is further evidenced by the fact that the ABA explicitly instructs capital trial counsel to avoid the very strategy the Sixth Circuit advocated in this case: "Consistency is crucial because, as discussed in the commentary to Guideline 10.10.1, counsel risks losing credibility by making an unconvincing argument in the first phase that the defendant did not commit the crime, then attempting to show in the penalty phase why the client committed the crime." *American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, 31 Hofstra L. Rev. 913, 1059 (2003).

In sum, the Sixth Circuit's decision here directly conflicts, both as to reasoning and result, with the opinions from these other Circuits, as well as with the sage advice of the ABA. There is simply no way to square these other cases with the holding below that selection of a residual doubt strategy over a potential brain damage defense is "on its face irrational." *Frazier*, 343 F.3d at 796, Appendix A at 24a. And, in addition to creating a conflict among the circuits, the sweeping declaration by the court here gives too little credence to residual doubt strategies, demonstrates too much confidence in jurors' perception of brain damage evidence,

and affords absolutely no credit to the state court's finding that such a strategy was reasonable in this case. *See* 28 U.S.C. § 2254(d)(1).

D. The Sixth Circuit's Mandated Reliance On Brain Injury Evidence Harms Criminal Defendants And Conflicts With Decisions Of This Court And Of The Ninth Circuit.

Oftentimes use of brain injury evidence as a mitigating factor can actually prove harmful to a criminal defendant, as it likely opens the door to rebuttal evidence that undermines a defendant's case. In fact, this Court has repeatedly recognized the reasonableness of trial counsel's strategy of avoiding any mitigation theory that would allow the State to produce harmful rebuttal evidence. *See Burger v. Kemp*, 483 U.S. 776, 788-96 (1987) (counsel exercised reasonable professional judgment in deciding not to do an all-out investigation because of its limited potential value compared to the negative evidence that could have been elicited); *Darden v. Wainwright*, 477 U.S. 168, 184-87 (1986) (counsel exercised reasonable professional judgment in avoiding testimony that the petitioner was nonviolent because it would have opened the door to damaging psychiatric testimony); *Bell v. Cone*, 535 U.S. 685, 692 (2002) (counsel's decision not to recall sister and call petitioner was reasonable in light of fear that they would reveal petitioner's criminal history); *Strickland v. Washington*, 466 U.S. 668, 699 (1984) (counsel reasonably feared that evidence of bad character, psychological analysis and criminal convictions would come in along with the proposed mitigation).[7]

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[7] As this Court has recognized the negative effect of opening up a defendant to damaging rebuttal evidence, the ABA has, as well, by codifying this rationale in their guidelines: "In determining what presentation to make concerning penalty, counsel should consider

The Ninth Circuit recently employed that very rationale in the context of a residual doubt strategy. In *Williams v. Woodford*, 306 F.3d 665 (9th Cir. 2002), the court held that trial counsel reasonably focused on a residual doubt strategy and declined to pursue drug use and mental capacity evidence because the latter theory would have allowed the State to introduce negative rebuttal evidence. *See id.* at 717 ("If the defense introduced evidence to suggest Williams's troubled family background or diminished mental capacity caused the offenses at issue, then the prosecution would probably present gang evidence to show that the offenses were part of Williams's gang lifestyle, not the result of any family problems or diminished mental capacity.").

The decision here—to the extent that the Sixth Circuit failed to consider the impact of rebuttal evidence against Frazier—directly conflicts with the Ninth Circuit's consideration of rebuttal evidence in determining the reasonableness of a residual doubt argument. In contrast to the Ninth Circuit's caution against using mitigation evidence that would likely produce negative rebuttal evidence—a decision that is entirely consistent with this Court's decisions and ABA guidelines—the Sixth Circuit incorrectly found here that Frazier "had everything to gain and nothing to lose by introducing evidence of his brain injury at the penalty phase of the case." *Frazier*, 343 F.3d at 796, Appendix A at 25a.

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whether any portion of the defense case will open the door to the prosecution's presentation of otherwise inadmissible aggravating evidence." *American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, 31 Hofstra L. Rev. 913, 1056-57 (2003). *See also Id.* at 1064 ("Finally, in preparing a defense presentation on mitigation, counsel must try to anticipate the evidence that may be admitted in response and to tailor the presentation to avoid opening the door to damaging rebuttal evidence that would otherwise be inadmissible").

In fact, if Frazier's counsel had actually adopted the strategy the Sixth Circuit said was required, Frazier would have been blistered with damaging rebuttal evidence. The natural rebuttal to a brain injury theory would have been to show that Frazier had significant trouble controlling his actions *before* the 1987 head injury. That evidence—which Frazier's jury never heard—would have included:

- Frazier was involved in murders committed while he was a member of the Hell's Angels in the 1960's and 1970's;

- Frazier began molesting Tiffany in 1982, and the molestation graduated to sexual intercourse by 1984 or 1985;

- In 1969, Frazier had pled guilty to assault and battery, a charge that was reduced from the original manslaughter charge;

- In 1972, Frazier was convicted of marijuana possession;

- In 1977, Frazier was convicted of forgery and misuse of credit cards;

- In 1978, Frazier was arrested and sentenced for unauthorized use of a motor vehicle; and

- In 1986, Frazier was sentenced to prison for gun violations and crimes involving stolen motorcycle parts.

These acts would have completely undercut any positive impact from the speculative head injury evidence. And this evidence also would have wiped out any benefit counsel hoped to derive from residual doubt. To suggest that counsel *must* have introduced evidence of brain injury, regardless of the impact of any rebuttal evidence on Frazier, would have *produced* inadequate representation rather than prevented it.

Because the Sixth Circuit's rule adopting an irrebuttable presumption in favor of brain injury evidence is directly contrary to this Court's precedent, as well as decisions from other Circuits, and, in addition, actually harms criminal defendants, this Court should grant certiorari and reverse that decision.

E. The Sixth Circuit's Codification Of A Per Se Brain Injury Rule Establishes A Rigid Rule That Handcuffs Defense Counsel's Ability To Try Capital Cases.

The Sixth Circuit's decision to elevate brain injury evidence to a position of primacy in the universe of mitigation defenses not only creates legal conflict, but, more importantly, creates confusion for counsel that try capital cases. This Court in *Strickland* noted the need to stay away from bright line rules in assessing attorney performance. *See Strickland*, 466 U.S. at 688-689 ("No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant."). Yet, this is exactly what the Sixth Circuit did in its decision: it created a bright line rule of strategy that intrudes on counsel's ability to make tactical decisions. As the Court in *Strickland* prophesied, the Sixth Circuit's rule here will "distract counsel from the

overriding mission of vigorous advocacy of the defendant's cause." *Id.* at 689.

This Court should review the decision below because it creates a "performance checklist" in evaluating attorney performance. If the box indicating "brain injury" is not checked, then, notwithstanding the facts of the case or the overall strategy of trial counsel, counsel's performance will be deemed ineffective. On the other hand, if trial counsel seek to adhere to this rigid guideline, they may actually render ineffective representation by presenting a brain injury that is inconsistent with trial phase strategy or opening the door to negative rebuttal evidence. In either case, a defendant's right to effective counsel is jeopardized.

CONCLUSION

For all of the foregoing reasons, this Court should grant the State's petition and reverse the Sixth Circuit's decision.

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